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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 363

LUCY C. SIMONS,
Petitioner,

vs.

MIAMI BEACH FIRST NATIONAL BANK, as Executor of the Estate of SOL SIMONS, Deceased,
Respondent.

BRIEF OF PETITIONER ON THE MERITS

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BRIEF OF THE PETITIONER ON THE MERITS

A petition for a writ of certiorari to the District Court of Appeal of Florida, Third District, was filed by Lucy C. Simons on August 10, 1964, and certiorari was granted by this Court by order dated October 19, 1964 (see P. Tr. 336).

(a) The opinion of the District Court of Appeal of Florida, Third District, sought to be reviewed herein, dated the 29th day of October, 1963, is officially reported at 157 Southern Reporter, Second Series, at page 199, and is shown in the printed transcript beginning on page 320.

(b) As set forth in the petition for a writ of certiorari the District Court of Appeal of Florida, Third District, entered the opinion as above stated on the 29th day of October, 1963. A petition for rehearing was filed within

the time allowed by the Florida Rules of Appellate Practice, which stayed any issuance of the mandate on the original opinion. The petition for rehearing was denied by the District Court of Appeal of Florida, Third District, on November 22nd, 1963, and the mandate was issued on the 22nd day of November, 1963 (see P. Tr. 323). A timely petition for certiorari was filed in the Supreme Court of Florida, which is a discretionary writ. This was filed on January 21, 1964, within the sixty-day period and pursuant to Article V, Section 4, of the Florida Constitution, and Rule 4.5c of the Florida Appellate Rules. On May 13, 1964 the Supreme Court of Florida denied the petition for writ of certiorari (see P. Tr. 335). This petition for certiorari was timely filed (Title 28, U.S.C., §2101). The jurisdiction of the Supreme Court of the United States is invoked under Title 28, U.S.C., §1257, as a certiorari from the final judgment or decree rendered by the highest Court of the State in which a decision can be made. The District Court of Appeal of Florida, Third District, is the highest State Court where the petitioner unsuccessfully petitioned for further discretionary review in the Supreme Court of Florida and, therefore, this petition is allowable by this Court (*Douglas* v. *People of the State of California*, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811).

(c) STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

(1) U.S.C.A., Title 28, §1738, 62 Stat. 947:

"The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Pos-

sessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947."

(2) Constitutional Provisions. United States Constitution, Article IV, Section 1:

"Full Faith and Credit shall be given in each State to the public Acts, Records and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

(d) (1) QUESTIONS PRESENTED. Did the State Courts of Florida fail to give full faith and credit to a prior decree of separation duly entered in the State of New York in favor of the wife, Lucy C. Simons, in refusing to grant to Lucy C. Simons, as the widow, her widow's rights by way of dower when the estate of Sol Simons was subsequently probated in Florida because a Florida Court, some six years after the final decree of separation in New York in favor of the wife, granted a divorce decree on a suit filed by Sol Simons in Florida where the wife was served by publication, but did not appear or plead in the case in person or by counsel, where it is conclusively shown in the State Court proceedings appealed from that the Florida divorce decree in favor of the husband, ex parte, was based upon the same grounds and the same factual situation which the husband had raised and pleaded unsuccessfully in the New York Court?

The Petitioner, Lucy C. Simons, contends that under the separation decree in the Supreme Court of New York in 1946 these controverted issues were decided in her favor and she was granted a permanent separate maintenance decree which reserved her status at the time of the death of Sol Simons as his widow. When Sol Simons died on October 26, 1960, he was present in New York State, lived in an apartment where the parties had lived during their marriage and in which he, the husband, remained domiciled until the date of his death. The husband left a Will in which he claimed he was a resident of Florida, in which the Miami Beach First National Bank, Miami Beach, Florida, was named as executor and in which Will no provision was made for the wife. Lucy C. Simons, after the death of her husband and claiming to have a property right as a widow's right under the New York law, or the more or less equivalent right as the widow under the Florida law, filed her claim for dower as the legal widow of Sol Simons in the County Judges' Court of Dade County, Florida, which is the Probate Court of Florida. Under the Florida procedure objection was filed by the executor on the ground that the ex parte Florida divorce decree cancelled this property right of the New York widow. When this objection was filed in the Probate Court and under the law of Florida, Lucy C. Simons, as the widow, was relegated to her action in the Florida Courts by way of an equity action for the determination of her rights as a property right in the estate of Sol Simons, deceased. The Circuit Court of Dade County entertained this complaint (see P. Tr. 1), but dismissed the complaint (see P. Tr. 315). Upon notice of appeal the District Court of Appeal of Florida, Third District, entered its opinion (P. Tr. 320. See also official reported decision, 157 So. 2d 199). The Supreme Court of Florida refused to grant a discretionary review by certiorari.

(d) (2) It is contended on this petition for certiorari that the District Court of Appeal of Florida, Third District, failed to give full faith and credit to the decree of separate maintenance of the State of New York through the Supreme Court of New York decision of 1946. In doing so Lucy C. Simons was deprived of her property rights without due process of law, in violation of the full faith and credit clause of the United States Constitution, Article IV, §1, and the Act of Congress, U.S.C.A., Title 28, § 1738, 62 Stat. 947, pertaining to full faith and credit, and in violation also of the Fifth Amendment of the Constitution of the United States, in that she has been deprived of her property without due process of law, and also that provision of the Fourteenth Amendment, Section 1, in that portion which provides:

> "Nor shall any State deprive any person of life, liberty or property, without due process of law:"

These property rights are established by the decision of this Court in *Estin* v. *Estin*, 334 U. S. 541, 68 S. Ct. 1213, 92 L. Ed. 1561 (see text 334 U. S. 548, 68 S. Ct., text page 1218, first column, first complete paragraph).

The essential constitutional question as raised in the petition for certiorari is the full faith and credit provisions of Article IV, § 1. The collateral reference to the Fifth and Fourteenth Amendments is submitted as a collateral proposition, because if the State of Florida is required to give full faith and credit to the New York decree of 1946, then Lucy C. Simons is the legal widow of Sol Simons, deceased, and her rights would then be adjudicated according to the state law.

(e) A CONCISE STATEMENT OF THE CASE.

Lucy C. Simons and Sol Simons were married on September 5, 1941, in New York City, and the parties lived

in a three-room apartment in Forest Hills. Up to the time the parties separated in February, 1946, Lucy C. Simons did all the clerical work in connection with her husband's business. Prior to November 25, 1946 and after February, 1946, Lucy C. Simons brought a suit in the Supreme Court of New York County under the style "Lucy C. Simons, plaintiff, vs. Sol Simons, defendant." The matter was heard before Mr. Justice James B. M. McNally, who entered a final decision of the Court on November 25, 1946. In this decision the Court set out that Lucy C. Simons had sued the defendant, Sol Simons, for a separation charging cruel and inhuman treatment. The Court found, as set forth in the original transcript at page 6, as alleged in the complaint and as shown in Exhibit 3 attached to the complaint (omitted by error in the first printing of the record in this case, but supplied by supplemental record, page 337), that the plaintiff in that case, Lucy C. Simons, had established that her husband was autocratic and despotic, egotistical and tyrannical, and his actions were such as to constitute inhuman treatment, and that in support of her complaint she had testified that on various occasions he struck her and forced her to leave by reason of his treatment; that he used vile and abusive language towards her and that he characterized her as a rat, a snake, a louse, a kike, stupid, vulgar and a guttersnipe; that he attempted to dominate her every act, and that his actions were calculated to and did cause her to become very nervous; that he struck her on a number of occasions and that he was insulting to her family. In hearing the case the Justice found on the other hand that the husband in defense stated he could give no reason for his wife's leaving him, except that she was suffering from change of life or menopause. The Court pointed out in its findings of fact:

"The question is one of fact. Practically every witness in the cause who testified was related to one of the parties, with the exception of Mary Sahanek, a woman who worked as a cleaner for the parties hereto substantially all their married life. Her testimony is to the effect that she heard arguments ten or twelve times, but she did not know the nature or the extent of the arguments."

The Court then said and found:

"The question really gets down to the question of fact between the plaintiff and the defendant. On the facts I believe that the plaintiff was a dutiful and loving wife, and that she did everything in her power to make a go of this marriage. I believe that the husband's testimony is unworthy of belief. I believe he was tyrannical, despotic; that he is a consummate actor; that he turns on tears as one would turn on Croton water.

I am not impressed with the tremor in his voice or the catch in his voice. I am not impressed with what I say is the false tear in his eye when he gave testimony.

I believe that he was cruel; that he was inhuman; that he beat his wife, who is five feet one inch and weighs 120 pounds; that he is six feet and weighs over 250 pounds; and I believe that every action on his part was calculated to and did bring about a nervous condition in his wife, and that no woman has a right to stand it.

Judgment in favor of the plaintiff on the merits.

Alimony, $500 a month."

This decree of separate maintenance entered on November 25, 1946, was continuing in one phase. On January 23, 1952 (see P. Tr. 240), at which time both Mrs. Simons and Mr. Simons were present, this hearing was con-

tinued in Room 238, New York County Court House, on an application by the wife to have her alimony increased. The record (P. Tr. 259) disclosed that Mr. Simons and his wife had prior to the separation lived at 6910 Yellowstone Boulevard, and that for six years after the separation and up to the time of this testimony on January 29, 1952 (see P. Tr. 240), he continued to live there. Reference to the printed record, page 247, as a part of the testimony taken on January 29, 1952, shows that Mr. Simons testified that a judgment of separation was entered in New York on December 4, 1946; that the original order provided for the payment of $500.00 a month and that was reduced by the Appellate Division to $400.00 a month. He testified that he had paid $400.00 a month ever since. Mr. Simons testified (see P. Tr. 241) that he was in the food brokerage business and was a selling agent for frozen fruits and fruit juices; that he had been in that business since 1942; that he had an office in his home. He said that he had been in Florida about three months. He was asked if he still maintained a residence at Forest Hills and he said that he was in the course of selling or liquidating that. He said he had bank accounts in New York City in the Sterling National Bank in Forest Hills and the National City Bank in Forest Hills and that he opened a bank account in a national bank in Miami Beach. He stated that he opened that bank account in Florida when he had to go to Florida on the doctor's orders, which was sometime in November, which was after the second proceeding for increase of the alimony had been filed and served. He stated he had safety deposit vaults or boxes (see P. Tr. 242) in the Sterling National Bank in Forest Hills. He, Mr. Simons, testified (P. Tr. 252) that his doctor told him he had to lay off for six months because of illness. He testified (P. Tr. 253) that the New York office business ceased at the end of the year, but he went away to rest.

Then counsel asked him and he answered (P. Tr. 253) that he bought new machinery and new office appliances in December. There was nothing brought up at that hearing of January 29, 1952 whereby Mr. Simons claimed that he had gone to Florida as a permanent resident or that he had discontinued his business affairs in New York as of January 29, 1952. He continued to live in the same apartment in New York and maintain his business there until he died there in New York in the fall of 1960.

In the meantime he filed a suit in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida (see P. Tr. 211) on March 11, 1952. This suit was a complaint for divorce. It was based upon service by publication. Nothing was said in the complaint about the separation proceedings in New York in 1946, or the proceedings which were still pending in the State of New York in the Supreme Court of New York in which he had just testified at length on January 29, 1952. He falsely charged (see P. Tr. 213) that on February 28, 1946 Lucy C. Simons had left the matrimonial domicile and had never resided with him as man and wife or in any capacity for the past six years, and that the desertion had been wilful, continuous and obstinate. We ask this Court to note that the decree for separate maintenance was entered on December 4, 1946 in favor of the wife, so that there could be no period of statutory desertion—wilful, continuous or obstinate—between the time of the separation on February 28, 1946 and December 4, 1946, when the final order was entered for separation alimony based upon the proceedings of November 25, 1946, above referred to.

The allegations in the complaint in Florida charged cruelty, and the only ground under the Florida law which was set forth in the complaint (P. Tr. 215) was:

"WHEREFORE, the plaintiff charges the defendant with being guilty of extreme cruelty within the meaning and purview of the laws and statutes of the State of Florida."

Nowhere in this complaint was any mention made of the final decree for separation or the fact that the parties had been living apart for approximately six years, based upon the permanent separation decree by the Supreme Court of New York. Service by publication was attempted. A decree pro confesso was entered because the defendant did not file her answer in the time prescribed by law (P. Tr. 218). The cause was referred to a Special Master in Chancery and the following testimony was submitted:

The deposition de bene esse of Sadie Fisher (P. Tr. 220), who was the aunt of Sol Simons. Her testimony did not purport to cover anything that took place after the separation, the exact date of which she did not give.

The Special Master made certain reports, findings and recommendations (see P. Tr. 225) and he recommended that the plaintiff, Sol Simons, be awarded a final decree of divorce and that no property rights were to be adjudicated.

The witness first called was Nathan Newmark, Jr. (P. Tr. 228). He testified that he had known Mr. Simons since December, 1939 and that Mr. Simons had moved to Miami Beach in mid-November, 1951. Then the witness was asked (P. Tr. 229) whether he had any conversation with Mr. Simons about whether he was going to become a permanent resident of Florida, and the witness answered:

"Well, he told me he came down here on account of his health. His doctor told him to come down. He told me it did him good."

There was no testimony that he came to Miami Beach, according to Mr. Newmark, to make it his permanent residence or that he had been in Florida continuously since November, 1951.

Mr. Albert Martin said (P. Tr. 229) that he had known Mr. Simons for some time and that he had had a conversation with him in Miami in 1951, about Thanksgiving Day, and that Mr. Simons told him he had transferred his home to Florida.

Then Sol Simons testified on his own behalf (P. Tr. 230). He testified that he had moved to Miami Beach; that he had taken out a license plate for his car; that he filed a declaration of domicile and citizenship, and then he proceeded to testify about certain relations pertaining to a claim of cruelty, but he did not mention at all that there had been a separation decree in New York in 1946 and he did not testify as to any conduct on behalf of his wife after the separation in 1946. He admitted that they were not living together (P. Tr. 235), but he made no mention of any grounds for divorce or factual matters except those which had taken place during their married life, which was terminated in February, 1946.

This completed the only testimony. A decree was entered in the Circuit Court of Dade County, Florida (P. Tr. 237), and the decree found that the defendant, Lucy C. Simons, had been guilty of extreme cruelty towards the plaintiff, Sol Simons, being the sole ground upon which Mrs. Simons had obtained a separation decree in New York in 1946, and which was still in force and effect, upon which testimony, additional testimony and additional hearings had been held in New York in January, 1952. No effort was made in this decree to fix any alimony or property rights. No facts were submitted that were not all precluded

by the prior separation decree and the judgment of the Court of New York.

The complaint filed in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, in Chancery, No. 62C 1980, is shown in the printed transcript beginning at page 1. The answer of the executor is shown on page 10. As reflected in the printed record, page 11, the executor admitted that Lucy C. Simons had filed a sworn election to take dower, but objected that the said Lucy C. Simons was entitled to dower in that Sol Simons had been validly divorced by virtue of a certain final decree of divorce in the Circuit Court of Dade County, Florida, bearing the date of April 30, 1952, entered in case No. 148091-E. The answer set forth that Lucy C. Simons had been served with process by publication and a notice through the mails to her address, Hotel Beacon, 75th Street at Broadway, New York, N. Y. Beginning in the printed transcript on page 16 there is reflected the testimony taken in this trial before the Chancellor on October 22, 1962. Page 17, as reflected in the printed transcript, shows the offer in evidence of an exemplified copy of the proceedings in the State of New York, the one in 1946 and the other starting in the fall of 1951 and ending up in April, 1952. Objection was made, but the Court overruled the objection, and these exhibits were marked Plaintiff's Exhibits 1 and 2. Exhibit No. 3 offered by the plaintiff was the entire Court file in case No. 148091, filed February 11, 1952. This was admitted as Plaintiff's Exhibit 3. All of the testimony taken in that case is then reflected in the printed transcript beginning on page 17. Certain of the depositions which had been taken were read in part, showing that Sol Simons had never left his domicile in New York on Yellowstone Boulevard and that he had lived there continuously, with the exception of busi-

ness trips, from 1946 until the date of his death in the late fall of 1960. This was the same apartment, according to the testimony, that Mr. and Mrs. Simons had occupied during the time of their marriage, until she was forced to leave in February, 1946.

The testimony of the witness, Arthur Joseph Meyers, as well as that of William H. Weber, conclusively showed that Mr. Simons continued to live in New York on Yellowstone Boulevard, with the exception that he would leave on a trip and that he never stayed over ten days as a rule. He was always going on trips to different places (see P. Tr. 72 as to Meyers' testimony). He repeated again (P. Tr. 73) that Mr. Simons was never gone more than a few weeks, even in 1952. He testified that Mr. Simons was back and forth to the apartment in New York, never being absent for more than a few weeks at any time up until the time of his death in 1960 (see general testimony, P. Tr. 85).

Mr. Jerome Mayer's testimony (P. Tr. 87) disclosed that he was an attorney practicing in New York and that he had served a subpoena upon Mr. Simons dated November 15, 1951, and that the return on the subpoena was marked "Sol Simons, 69-10 Yellowstone Boulevard, Forest Hills 1/29."

The printed transcript on page 91 shows excerpts from the deposition of Myron J. Green taken July 24, 1962. He had originally been attorney for Sol Simons in 1946. He was asked if he had had any other representation and his answer was (P. Tr. 92):

> "A. His wife at that time, Lucy C. Simons, sued him for separation in the Supreme Court of New York County.
>
> Q. What year was that, sir?

A. The action was started in 1946.

Q. Calling your attention to 1951, did Lucy C. Simons in that action institute any sort of proceedings?

A. Yes. She made an application—the answer is yes.

Q. What sort of proceeding did she institute and when?

A. She made an application to increase the amount of alimony which she was receiving under the judgment and decree in the separation action which was entered in 1947."

Then the deposition purported to show that Mr. Green had written to Mr. Simons in Miami Beach in the fall of 1951 (P. Tr. 93). In the printed transcript on page 94 it appears that Mr. Green identified certain of the portions of the transcript of the hearing on January 22, 1952 in New York. This was marked Plaintiff's Exhibit No. 4. Mr. Green testified (P. Tr. 95) that the actual order increasing the alimony was entered on March 31, 1952 by the Supreme Court Justice in New York. He was then asked (P. Tr. bottom page 95):

"Q. Now, during the course of the pendency of this litigation in New York, did you become aware of the fact that a Florida divorce proceeding had been instituted by Sol Simons against Lucy C. Simons?

A. Yes.

(P. Tr. 96) Q. How did you become aware of that fact, sir?

A. Mr. Simons told me about it."

Then he said he had talked to the attorney for Mrs. Simons, Mr. Mayer, and that he understood that Mrs. Simons expected to appear and contest the divorce action in Florida and that he had so advised Mr. Simons. This correspond-

ence was attached as Plaintiff's Exhibits 5 and 6, which letters are reflected (P. Tr. 269 and 270 respectively). Plaintiff's Exhibit 5 was the letter from Myron Green dated April 3, 1952, in which Sol Simons was advised that the New York Supreme Court had increased the alimony to a new rate of $440.00 per month on April 1, 1952. The last paragraph of the letter is significant:

> "In the light of recent telephone conversations which I had with Mr. Jerome Mayer, I am of the opinion that they will appear and contest your divorce action in Florida."

The letter from Sol Simons, which appears to be undated, was in direct answer to the letter of Mr. Green of April 3, 1952. The heading or caption at the top of the page is SOL SIMONS, Food Products, (telephone) Illinois 9-6026, (address) 69-10 Yellowstone Boulevard, Forest Hills, Long Island, N. Y. Then there is a rubber stamp impression—"Correspondence from 1110 Venetian Way Miami Beach, Fla.—Telephone 3-6330." The second paragraph of this letter is typical and demonstrates the whole singleness of purpose in Sol Simon filing the Florida suit:

> "I would appreciate your advising me the last day that an appeal can be filed against the decision rendered. I am considering appealing from the increase as I feel any payment whatsoever in this matter is a reward to perjury and miscarriage of justice, due to a temperament of a Judge whose decision was not based on facts. This has been my feeling for over 6 years, and I will never rest until I have been vindicated from a false indictment. * * *
>
> I note your opinion from your conversation with Mr. Mayer that they will appear to contest my divorce action. I would welcome such an appearance which will afford me the opportunity of presenting the facts again to prove that perjury has been committed."

Apparently Mr. Simons wanted the Florida Court to relitigate the same factual matters that Mrs. Simons and Mr. Simons had testified about in 1946 and upon which the Supreme Court of New York had rendered the opinion that Sol Simons was guilty of extreme cruelty towards his wife. It seems he expected to retry these same facts in Florida, because he had been "nursing a grudge" for six years.

The record in the Florida case, which we have above mentioned and referred to, does not reflect that in the complaint in Florida or in the testimony in Florida Mr. Simons purported to claim anything or any ground of divorce under the Florida law which had not been fully disposed of on the same charges and the same evidence in New York six years prior thereto.

The entire record in the State Court proceedings filed in 1962, after the death of Sol Simons, is copied in this record, and while it may be of interest to this Court, it was not of any interest to the State Court and the trial Judge. The Judge of the Circuit Court of Dade County, Florida did not purport to pass upon whether Sol Simons now was able to show through his executor that he had a semblance of a residential or jurisdictional basis for his suit in Florida, nor did the lower Court in Florida ever pass or purport to pass upon whether the grounds in the 1946 separate maintenance proceedings in the Supreme Court of New York, or the factual matters passed upon therein, were similar and in fact identical to the same matters which Sol Simons sought to litigate again in Florida. The Court went off solely upon the point that Mrs. Simons had not been lulled into any inaction or that Mr. Simons had not represented to her that he was going to dismiss the Florida divorce proceedings.

Page 208 of the printed transcript reflects the following statements by the Court:

"The Court: It seems to me the prime question is whether or not the divorce decree is or is not valid.

Mr. Ward: That is one phase of the case that will turn around the other cases. We can get around that very soon. But there is another phase of the case that I want to bring up today, and that is the Armstrong case that went up from Florida to the Supreme Court of the United States.

The Court: I will simplify it for you. In my opinion, the evidence is wholly and totally insufficient to destroy the presumption of correctness of the divorce decree. I think the burden is upon the person who attacks it, and I think the evidence falls remarkably short of it."

The Court then said (P. Tr. 209):

"The Court: On this, she was lulled into a false sense of security.

Her testimony does not gibe with the facts, because she has not said when it was. But she said it was a day or two after she got it.

They were dealing at arm's length. He was angry with her, because she had brought these proceedings to increase the alimony, and she had to have it done legally. But she had nothing done legally about stopping the divorce here.

After she talked to him, she went to a man who said that the Florida divorce was no good. The attorney may have given her a false sense of security."

This was followed up by the written decree of the Chancellor in the State Court (P. Tr. 315), wherein the Court in the written decree said:

"Pursuant to proper notice, this cause came on for final hearing, and after careful consideration of the pleadings and the proof, the Court having heard the

testimony and received the evidence adduced by the parties at the final hearing, and in all respects being fully advised in the premises, the Court adopts as its findings the observations made by the Court at the conclusion of the final hearing."

He thereupon dismissed the cause with prejudice.

A notice of appeal to the District Court of Appeal of Florida, Third District, was filed by Lucy C. Simons (P. Tr. 316), and assignments of error were filed on April 5, 1963 (P. Tr. 317), within the time fixed by the Rules of Florida Appellate Procedure. Without quoting each and every of the assignments of error Lucy C. Simons, through her counsel, pointed out that the lower Court erred in denying the wife's claim of dower in the Florida probate proceeding, and that the Court erred in the dismissal of the case, in refusing to hold that Lucy C. Simons was at the time of the death of her husband, Sol Simons, in New York City the wife of Sol Simons.

Assignment of error No. 3 pointed out that the Court erred in denying the claim that Lucy C. Simons was the wife of Sol Simons at the time of his death, because it failed and refused in so doing to give full faith and credit under the constitutional provisions of the United States to the fact that the status of the plaintiff and her husband was determined by the proceedings in the State of New York by way of permanent separation for alimony without divorce, and at the time and up to the time of the death of Sol Simons he lived and maintained a place of residence in the State of New York, his business was in the State of New York, he died in the State of New York and he was thereby a resident of the State of New York at the time of his death to the extent that he was bound by a separate maintenance proceeding which created the relationship of husband and wife under the laws of the

State of New York at the time of his death. These are the substantive matters claimed as a violation of the federal law which the Courts of Florida, both the trial and appellate Courts, utterly ignored.

We then pointed out on behalf of Lucy C. Simons in assignment of error No. 5 that the Florida Court erred in holding that the mere knowledge of the pendency of the divorce suit in Florida in 1952 and the receipt of a summons by mail, precluded the plaintiff from ever questioning the jurisdiction in the State of Florida of Sol Simons' claim as a citizen and resident in the state for divorce purposes, and holding that plaintiff was estopped or that the suit in Florida was res judicata to her claim for widow's rights by way of dower or otherwise.

Assignments of error Nos. 6 and 7 raised similar points, the substance of which was that the Florida Court had erred in holding that the ex parte divorce decree in the State of Florida, based upon identically the same grounds and same facts which had been previously adjudicated in the case in New York in 1946, could be utterly ignored and that the entire contractual or property rights or marital rights of Lucy C. Simons against the estate of her husband were completely wiped out and held for naught by the ex parte proceedings in Florida.

The opinion of the District Court of Appeal of Florida, Third District, is shown in the printed transcript at page 320. A study of this opinion will reflect without dispute that the District Court of Appeal of Florida, Third District, also failed to give any consideration to the full faith and credit clause of the Constitution of the United States, and failed to give any recognition to the fact that by virtue of the prior separation decree in New York in 1946 the wife had certain property rights, both during the marriage and after the death of the husband, which could not be severed

or destroyed by the fiction of some other state's decree based upon the same grounds and the same facts which had been judicially declared and a decree rendered thereon in New York. The Appellate Court in Florida simply held that since she had notice that a suit for divorce was filed in Florida and she made no effort to contest it, she was forever barred. In effect and by reasonable logic, if Sol Simons had been defeated in his suit in Florida in 1952, he could then have gone to any other state until he had exhausted each forum.

(f) ARGUMENT. The decision by this Court of *Gene Durfee v. Julia E. Duke*, 375 U. S. 106, 84 S. Ct. 242, held clearly that the full faith and credit provisions of the Constitution and the statutory law of Congress requires every state to give to a judgment at least the res judicata effect which the judgment would be accorded in the state which rendered it. Headnote 3, taken from 84 S. Ct. 242, provides:

> "By constitutional provision for full faith and credit, local doctrines of res judicata become a part of national jurisprudence and are therefore federal questions cognizable before the Supreme Court."

Headnote 5:

> "A judgment of a court in one state is conclusive upon merits in a court in another state only if court in first state has power to pass on the merits, but when second court's inquiry discloses that those questions had been fully and fairly litigated and finally decided in the court which rendered the original judgment that judgment is entitled to full faith and credit."

In the body of the opinion (see 84 S. Ct. 247), this Court held:

> "It is argued that an exception to this rule of jurisdictional finality should be made with respect to

cases involving real property because of this Court's emphatic expressions of the doctrine that courts of one State are completely without jurisdiction directly to affect title to land in other States. This argument is wide of the mark. Courts of one State are equally without jurisdiction to dissolve the marriages of those domiciled in other States. But the location of land, like the domicile of a party to a divorce action, is a matter 'to be resolved by judicial determination.' Sherrer v. Sherrer, 334 U. S. at 349, 68 S. Ct. at 1090, 92 L. Ed. 1429. The question remains whether, once the matter has been fully litigated and judicially determined, it can be retried in another State in litigation between the same parties. Under the reason and authority of the cases we have discussed, it is clear that the answer must be in the negative."

In the petition for certiorari which was granted by this Court counsel for Lucy C. Simons pointed out certain decisions of the Supreme Court of Florida which had originally recognized this rule—*Gaylord* v. *Gaylord*, 45 So. 2d 507, and a recent opinion by the District Court of Appeal of Florida, Second District, a 1961 decision, in the case of *Edgar* v. *Edgar*, 126 So. 2d 585. In both of these cases the Courts of Florida have given recognition to the provisions of Section 1, Article IV, of the Constitution of the United States, and pointed out that in previous cases the Supreme Court of Florida had held that the State of Florida had no desire to furnish a legal haven for fugitive husbands (*Sackler* v. *Sackler*, 47 So. 2d 292, 18 A.L.R. 2d 856), and pointed out:

"* * * we might well add to that expression of public policy that an attempt to escape responsibility to pay child support is looked upon with equal disfavor."

In a more recent case by the District Court of Appeal of Florida, Second District, *Clarence A. Borst, Appellant,*

v. *Anna Borst, Appellee,* a 1964 decision, 161 So. 2d 693, that Court held;

Headnote 1:

"Florida court was precluded, by due process of law requirements, from affecting, on application of former husband who resided in Florida, alimony rights vested in wife under foreign decree where marriage, divorce and alimony proceeding all took place outside of Florida and wife had not submitted herself to jurisdiction of Florida court.

Headnote 2:

"Former wife's vested rights to alimony under foreign decree were personal and subject only to in personam jurisdiction over her, and could not be affected by court which had no personal jurisdiction over her on any theory that former husband's proceeding for relief was in effect quasi in rem."

The said Court quoted with approval in this opinion from *17 Am. Jur., Section 987 (Am. Jur. 17A)*, and cited with approval from Section 987:

"The divorce court must have jurisdiction of the wife in personam in order to adjudicate or cut off her right to alimony. While a court may gain jurisdiction to grant a divorce by constructive service upon a non-resident wife, such service does not give it jurisdiction to adjudicate alimony rights, and so it is held that an ex parte divorce, obtained by the husband, does not necessarily affect the right of the wife to alimony under the laws of another state, and any express or implied adjudication against her claim is void and will not be given effect by comity or under the full faith and credit clause."

Further quoting, the Court quoted certain excerpts from *17A Am. Jur., Section 988,* as follows:

"The rule is that where a wife obtains a divorce a mensa or a judicial separation and an award of alimony in one state, another state can not adjudicate or terminate the right unless it gains jurisdiction in personam over the wife. A judgment for alimony is a property right, intangible in nature, and jurisdiction over an intangible can only arise from jurisdiction over the person."

Then the Court proceeds to analyze (text, p. 695) certain opinions of this Court, as follows:

"There are a series of cases from the United States Supreme Court which we think are conclusive on the issue herein. It is only necessary to note herein what we consider a 'trilogy' of decisions on the subject. This 'trilogy' is composed of Estin v. Estin, 1948, 334 U. S. 541, 68 S. Ct. 1213, 92 L. Ed. 1561; Armstrong v. Armstrong, 1956, 350 U. S. 568, 76 S. Ct. 629, 100 L. Ed. 705; and Vanderbilt v. Vanderbilt, 1957, 354 U. S. 416, 77 S. Ct. 1360, 1 L. Ed. 2d 1456."

The Florida Court has apparently acted upon the erroneous presumption that a service of process by publication or mailing from the Florida Court to a resident of New York is the equivalent of personal service. This is an erroneous conclusion and, as pointed out in the opinion in the case of *Borst* v. *Borst*, above cited, on page 695, the Supreme Court of the United States has settled that principle of law in the case of *Armstrong* v. *Armstrong*, 1956, 350 U. S. 568, 76 S. Ct. 629, 100 L. Ed. 705, in which this Court (U.S. Supreme Court) reapplied the doctrine of *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. Ed. 465:

As we will point out in the next portion of this brief, a complete separate maintenance decree under the law of New York when entered by the Supreme Court of New York, a Court of record, where both parties were residents of the state at that time and both were present before the

Court, determines two things: (1) the right of permanent separation and the right to the lifetime alimony which is awarded by the Court; and (2) retains the status of the wife, if she is the plaintiff, as the legal widow of the husband upon his death. These are property rights. Where the bulk of the estate, if not all, consists of intangible personal property, the title to that intangible property and the location or legal situs of that personal property accompanies the person of the owner. *Beverly Beach Properties* v. *Nelson*, 68 So. 2d 604, certiorari denied *Rensta* v. *Beverly Beach Properties*, 75 S. Ct. 27, 348 U. S. 816, 99 L. Ed. 643.

One of the controlling cases by this Court which has been often recognized as controlling by the Florida Courts, but ignored in this case, is *Estin* v. *Estin*, 1948, 334 U. S. 541, 68 S. Ct. 1213, 92 L. Ed. 1561. The other two cases which have been termed as a part of the "trilogy" of this Court's opinions on this subject are *Armstrong* v. *Armstrong*, 1956, 350 U. S. 568, 76 S. Ct. 629, 100 L. Ed. 705, and *Vanderbilt* v. *Vanderbilt*, 1957, 354 U. S. 416, 77 S. Ct. 1360, 1 L. Ed. 2d 1456.

A reference to the contents and substance of the opinion of the Estin case will demonstrate this point. As appears in this case the wife had obtained a New York judgment for separation and an award of permanent alimony. The husband had thereafter brought action and obtained a divorce in Nevada, but the wife was not personally served and did not appear in that action. While the husband was still living he was then joined in a petition in the Courts of New York to require him to continue to make his alimony payments. The husband then by way of defense pleaded the Nevada divorce decree. The New York Courts denied that relief, and through several appeals the Court of Appeals of New York, 296 N. Y. 308, 73 N. E. 2d 113, affirmed that ruling. This Court granted

certiorari and after some discussion by this Court of the background of the litigation and decisions, both the New York and Nevada Courts, this Court said (see text, page 1218, 68 S. Ct., and page 548 of 334 U. S. 541):

"The New York judgment is a property interest of respondent, created by New York in a proceeding in which both parties were present. It imposed obligations on petitioner and granted rights to respondent. The property interest which it created was an intangible, jurisdiction over which cannot be exerted through control over a physical thing. Jurisdiction over an intangible can indeed only arise from control or power over the persons whose relationships are the source of the rights and obligations. Cf. Curry v. McCanless, 307 U. S. 357, 366, 59 S. Ct. 900, 905, 83 L. Ed. 1339, 123 A.L.R. 162.

Jurisdiction over a debtor is sufficient to give the State of his domicile some control over the debt which he owes. * * * But we are aware of no power which the State of domicile of the debtor has to determine the personal rights of the creditor in the intangible unless the creditor has been personally served or appears in the proceeding. The existence of any such power has been repeatedly denied. Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565, etc. * * *

We know of no source of power which would take the present case out of that category. The Nevada decree that is said to wipe out respondent's claim for alimony under the New York judgment is nothing less than an attempt by Nevada to restrain respondent from asserting her claim under that judgment. That is an attempt to exercise an in personam jurisdiction over a person not before the court. That may not be done. Since Nevada had no power to adjudicate respondent's rights in the New York judgment, New York need not give full faith and credit to that phase of Nevada's judgment."

It is true that there were two dissenting opinions in that case, but the effect of the dissents appears to raise the question as to the doctrine of a divisible divorce. Mr. Justice Frankfurter in his dissenting opinion pointed out that if under the full faith and credit clause Nevada was required to recognize the finality of the separation proceedings in New York, then Nevada would have to give effect to that and the divorce would not be valid.

Mr. Justice Jackson went beyond that point and pointed out that three months after the separation and the award of alimony had been made by the New York Court in October, 1943, the husband then journeyed to Nevada and in three more months began a divorce action. No process was served on the wife in Nevada, and he mentions in the opinion (see first column of text, page 1221, (334 U. S., page 554)), as follows:

> "* * * she was put on notice only by constructive service through publication in New York. Notified thus of what was going on, she was put to this choice: to go to Nevada and fight a battle, hopeless under Nevada laws, to keep her New York judgment, or to do nothing. She did nothing, and the Nevada court granted the husband a divorce without requiring payment of alimony.
>
> Now the question is whether the New York judgment of separation or the Nevada judgment of divorce controls the present obligation to pay alimony. The New York judgment of separation is based on the premise that the parties remain husband and wife, though estranged, and hence the obligation of support, incident to marriage, continues. The Nevada decree is based on the contrary premise that the marriage no longer exists and so obligations dependent on it have ceased.
>
> The Court reaches the Solomon-like conclusion that the Nevada decree is half good and half bad un-

der the full faith and credit clause. It is good to free the husband from the marriage; it is not good to free him from its incidental obligations. Assuming the judgment to be one which the Constitution requires to be recognized at all, I do not see how we can square this decision with the command that it be given full faith and credit. For reasons which I stated in dissenting in Williams v. North Carolina, 317 U. S. 287, 63 S. Ct. 207, 87 L. Ed. 279, 143 A. L. R. 1273, I would not give standing under the clause to constructive service divorces obtained on short residence. But if we are to hold this divorce good, I do not see how it can be less good than a divorce would be if rendered by the courts of New York."

The same result was reached by this Court in *Kreiger* v. *Kreiger*, 334 U. S. 555, 68 S. Ct. 1221.

In the subsequent case of *Vanderbilt* v. *Vanderbilt*, 354 U. S. 416, 77 S. Ct. 1360, 1 L. Ed. 2d 1456, the issues were slightly different. Cornelius Vanderbilt, Jr. and Patricia Vanderbilt were married in 1948. They separated in 1952 while they were living in California. The wife moved to New York, where she had resided since 1953. While the wife was a resident of New York the husband filed a suit for divorce in Nevada. The wife was not personally served and did not appear before the Nevada Court, but that Court entered a decree for divorce in June, 1953. About ten months later, in April, 1954, Mrs. Vanderbilt instituted an action in New York, praying for separation from Cornelius Vanderbilt, Jr. and asking for alimony. The New York Court did not have personal jurisdiction over him, but it did sequester certain of his property within the state. Vanderbilt appeared specially and, among other defenses, contended that the full faith and credit clause of the United States Constitution compelled the New York Court to treat the Nevada divorce as having

ended the marriage and as having destroyed any duty of support which he owed the respondent. The New York Court found that the Nevada decree was valid insofar as it dissolved the marriage, but it nevertheless entered an order under § 1170-b of the New York Civil Practice Act, directing Vanderbilt to make designated support payments. Vanderbilt then petitioned this Court claiming that the New York decree violated the full faith and credit clause, and this Court held that the Nevada divorce court was as powerless to cut off the wife's support right as it would have been to order the husband to pay alimony if the wife had brought the divorce action and he had not been subject to the divorce court's jurisdiction.

Again Mr. Justice Frankfurter dissented, and in substance his dissent was based upon this statement (see 77 S. Ct., text page 1365):

> "Calling alimony a 'personal claim or obligation' solves nothing. I note this concern for 'property rights,' but I fail to see why the marital relation would not be worthy of equal protection, also as a 'personal claim or obligation.' It may not be translatable into dollars and cents, but that does not make it less valuable to the parties. It cannot be assumed, by judicial notice as it were, that absent spouses value their alimony rights more highly than their marital rights. Factually, therefore, both situations involve the adjudication of valuable rights of an absent spouse, and I see no reason to split the cause of action and hold that a domiciliary State can ex parte terminate the marital relation, but cannot ex parte deny alimony. 'Divisible divorce' is just name-calling."

Mr. Justice Harlan also dissented, but in this dissenting opinion Justice Harlan points out that there would be a difference where the wife obtained a domicile in New York—for example, after the ex parte divorce had been

granted in Nevada—and a case where the parties had both lived in New York where the New York Courts granted a permanent separation decree.

To be perfectly frank with this Court, the decisions by this Court in the past have been somewhat difficult for the average lawyer to understand. We are not too sure that it is necessary in the case at bar for all of these points that conflict be adjusted or clarified. Here we have a case that certainly goes beyond any of the reported decisions by this Court on the subject matter. We are not actually concerned with the matrimonial status to the extent that that point was involved in the Estin case, the Vanderbilt case or the Armstrong case. Mr. Simons was in New York in 1960 when he died, or at least his body was present in New York. Up until the date of his death he made the alimony payments to his wife, who also lived in New York. His intangible property was vested in New York insofar as situs and title are concerned. The New York statutes create a widow's rights into a deceased husband's estate which can not be taken away from her by a Will. Similar rights are protected for the benefit of the wife under the Florida law. Both of these rights are an incident to the fact that a woman is the legal widow of the husband who is deceased. These statutory rights, whether it be in New York or in Florida, are an essential part of any contract of marriage. If Sol Simon's Will had been probated in New York there is no question about the rights of Mrs. Lucy C. Simons. Can that right be completely annulled, cancelled and discharged because Sol Simons left a Will appointing a Florida bank as executor and in that Will all rights of the wife were eliminated? If Lucy C. Simons had a property right under the prior decree in New York, she had the right to be his wife so far as property rights were concerned after his death, because that is what the

New York law provided for. That is what the Florida law provides for.

Sometimes in the course of modern events an exact precedent from former opinions of this Court or State Courts can not always be cited. However, is that necessary? There are certainly no cases which could be cited as a precedent against the contention of Lucy C. Simons. We do not here have any question that Sol Simons remarried or that Lucy C. Simons remarried. If the husband as a part of the separation decree in New York had even entered into a contract to make a Will protecting his wife in the event of his death, that contract would be enforceable in any state in the Union where the husband died. If alimony is paid or required to be paid even in the divorce action for the lifetime of the widow, then that is a claim against the husband's estate (see *Aldrich* v. *Aldrich* (Fla. 1964), 163 So. 2d 276, wherein the Supreme Court of Florida rendered an advisory opinion to this Court on this subject matter).

The Florida Supreme Court has held in what is commonly referred to as the "first *Gordon* v. *Gordon* case" (1948), 36 So. 2d 774, 160 Fla. 838, as follows:

> "A final decree of Pennsylvania court denying wife a divorce on ground of indignities to her person was entitled to full faith and credit in wife's Florida divorce action on ground of extreme mental cruelty, where character of testimony produced by wife in Florida case was essentially the same as that which she would have been required to present to establish her charge of indignities to her person had she pursued her action in Pennsylvania, in which state she was given ample notice and opportunity to be heard."

After the opinion by the Supreme Court in that case denying the wife's attempt to obtain a re-adjudication of

the Pennsylvania action in the Florida Courts, the wife was permitted to file an additional or amended complaint charging that the husband had been guilty of desertion, and based upon different factual matters. The lower Court in Florida granted the wife a divorce upon the new grounds and new facts not previously litigated in the Pennsylvania action. The Supreme Court of Florida affirmed that decision, 59 So. 2d 40, *headnote 3*, wherein it said:

> "The general proposition that when final decree or judgment of court of competent jurisdiction becomes absolute it puts at rest and entombs in eternal quiescence every justiciable, as well as every actually adjudicated issue, is not controlling except in instances where second suit is between same parties and is predicated upon same cause of action as was first; and if second suit is bottomed upon different cause of action than that alleged in prior case, estoppel by judgment comes into play, and only those matters actually litigated and determined in initial action, and not other matters which might have been, but were not, litigated or decided, are foreclosed."

When Mr. Simons died in October, 1960 and the widow in New York found that he had left a Will, with a Florida executor, claiming to be a Florida resident, in which the wife was totally eliminated (see P. Tr. 307), then what remedy was left to the wife? She had contended that she was fully protected by the proceedings in New York, but the assets had been removed from the place of her husband's domicile in New York to the State of Florida. The Courts of Florida take the position that regardless of what she may be or what her legal status may be in New York, she can not have any relief in the Florida Courts, where the assets are lodged, because there appears on the surface to be a decree from a Circuit Court of Florida entered in April, 1952 in an ex parte divorce case which separated

the marriage of Sol Simons and Lucy C. Simons. The Florida Court refuses to even entertain the merits of a claim that this divorce decree was void because it was contrary to the full faith and credit clause, or even that it was void because Sol Simons did not have the residence jurisdiction requirements in Florida. They simply take the position, both in the lower Court and in the Appellate Courts, that once it is established that the process by substituted service by mail and publication was served upon Mrs. Simons in New York City, or even if she knew about the proceedings in the case, she, her marital status, and her property rights as the widow were forever foreclosed.

It is true that in the state action Lucy C. Simons challenged the jurisdiction of the Florida Court and offered what we say is conclusive testimony that Sol Simons' purported residence in Florida was a mere sham and a fraud, yet the Florida Courts did not even concern themselves with that problem. Lucy C. Simons showed by undisputable testimony that the grounds upon which the suit was filed in Florida, some six years after the final determination in New York, were identical as to charges and as to facts and, therefore, were void under the United States Constitution. Yet the Florida Courts paid no attention to that claim.

CONCLUSION

A decision such as we find now in the Florida Courts, if permitted to stand, makes the constitutional provisions and Acts of Congress pursuant thereto regarding full faith and credit a sham and a mockery. If such a decision could stand, then all that a New York resident would have to do would be to cross the Hudson River and name a bank or trust company in Jersey City, New Jersey, as his executor.

All he would have to do is to get an ex parte divorce of some kind—whether it be from Nevada, Alabama, Arkansas, Florida or any of the other so-called "easy divorce states", and when the widow in New York sought to exercise her statutory property rights upon the death of her husband, simply to meet that demand by saying that some state had granted an ex parte divorce in favor of the husband. Perhaps they could even plead a Mexican divorce procured by mail order.

This is a typical example of a sheer fraud practiced on the Courts of New York, and even practiced on the Courts of Florida. This kind of a decision even makes a mockery out of that nebulous doctrine of "a divisible divorce", which even though perhaps justified at the time it was enunciated, certainly should have no permanent standing in the jurisdiction of the United States and this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that three (3) true and correct copies of the Brief of Petitioner on the Merits were furnished by mail, by depositing same in a United States mailbox, with first class postage prepaid, addressed to counsel of record for the respondent, Marion E. Sibley and Irving B. Levenson, 605 Lincoln Road, Miami Beach, Florida 33139, on this ..... day of January, 1965.

_____,
WILLIAM GRESHAM WARD.